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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

Adoption of BRIAN H., a minor.	H024391 (Santa Clara County Super. Ct. No. A17407)
JEFFREY R. et al., Plaintiffs and Respondents, v. KYLE S., Defendant and Appellant.	

Appellant Kyle S. appeals termination of his parental rights to now two-year-old Brian H. on March 27, 2002, claiming the trial court failed to comply with the provisions of the Indian Child Welfare Act (ICWA). (25 U.S.C. § 1901 et seq.) We affirm.

FACTS

Brandy H. gave birth to Brian H. in Wyoming in January 2001, and immediately gave him up for adoption to Jeffrey and Diane R. Brandy did not name Kyle as the father on Brian's birth certificate. Brandy signed a Wyoming relinquishment of her parental rights on January 10, 2001, and, because the Rs live in California, she signed a California relinquishment on May 19, 2001. The latter document was witnessed by the Department of Social Services (DSS) and therefore became irrevocable that same day.

The day before, Brandy signed two declarations, one stating that Brian's biological father was Kyle, that Kyle knew of the pregnancy and did not contribute any

financial support to her, that she never lived with him, and that he never filed any court action to establish paternity. The second declaration stated that she knew that Kyle claimed to have some Indian blood, but that she did not believe that he was a member of any Indian tribe. She stated that if Brian was found to be an Indian child, she nevertheless wanted the Rs to raise him.

Brandy had become pregnant when she was 16 by then 18-year-old Kyle in Nebraska. The relationship was abusive; Kyle slapped Brandy, burned her arm with a cigarette, and urinated on her. Shortly after Brandy became pregnant, Kyle was jailed on misdemeanor convictions of assault and tampering with a witness and was sentenced to two consecutive one-year terms.

Kyle was incarcerated when the Rs served him with a "Notice of Alleged Paternity" which included the fact that Brian had been placed for adoption. Kyle responded by writing the court in June stating that he was incarcerated and indigent, that he was a member of the Pine Ridge Reservation (tribe), a federally recognized tribe which had not been given notice of the proceedings, and that Brian, to whom he referred as "my child," was eligible for membership in his tribe. He stated he believed the ICWA applied to the case and requested appointment of counsel.

The Rs filed a petition to terminate Kyle's parental rights, and the court appointed counsel for him. Thereafter, Kyle's mother, Connie S., filled out a form, "Information on American Indian Child (Adoption Program)," stating that Brian had Oglala Sioux, Cheyenne, and Rosebud blood. She identified Kyle as 21/64th Oglala Sioux.

The DSS served the four tribes that Brian might have belonged to and got a response that Kyle was listed on the census ledger of the Oglala Sioux Pine Ridge tribe and confirming his being "21/64 degree Oglala Sioux Indian Blood." In the space on the tribe's response for an enrollment number, was "ENROLLMENT PENDING." The Rs served the tribe with a notice of its "possible" right to intervene and gave notice of a

hearing "regarding this proposed adoption." When that hearing took place on October 31, 2001, the court ordered paternity testing.

Paternity test results showed that Kyle was Brian's father and the parties stipulated to that fact at the next hearing on January 2, 2002. The court ordered DSS to "formally" notify the tribe. Although no notice from the DSS to the tribe dated after January 2, 2002, appears in the record, the Rs served all parties and the tribe with a Notice of Ruling and Continuation of Hearing to January 31, 2002.

The Oglala Nation Tiospaye Resource and Advocacy Center sent the court a "Notice of Intervention" dated January 8, 2002. It arrived on January 28, 2002. The tribe did not state it was intervening at that time; the tribe asked the court "to take notice of the Oglala Sioux Tribe's Intent to Intervene in this matter based on the following grounds: [¶] THAT, the Oglala Sioux Tribe is a Tribe as defined by the Indian Child Welfare Act of 1978, Section 4, Paragraph (8), and is the Tribe of the minor child/ren named herein. [¶] THAT, the Oglala Sioux Tribe retains the right to Intervene in these proceedings pursuant to the Indian Child Welfare Act of 1978, Section 101, Paragraph © [*sic*] . . . ." and that "MOVANT RESPECTFULLY REQUESTS THE FOLLOWING: [¶] To provide notice of any and all future hearings and to take notice of the Oglala Sioux Tribe's Intent to Intervene in this matter and to further submit information to: [¶] Oglala Nation Tiospaye Resource & Advocacy Center . . . ."

The Rs filed an application to declare the ICWA inapplicable, or in the alternative, to alter the placement preferences of the Act. Brandy supported the application with the statement that she "vehemently object[ed] to the adoption of my son being transferred to the jurisdiction of any other court, especially to any Indian tribal court." Kyle objected.

At the March 27, 2002, hearing on the ICWA issue, the tribe did not appear. The court granted the Rs' application commenting that the father and the tribe had the burden of proving by a preponderance of the evidence that the ICWA should apply but that there was no evidence of Kyle's or Brian's tribe membership in the record. The court asked if

either side had heard anything from the tribe, and Kyle's lawyer John Nieman stated that the "On-Track Alliance Agency. . . . [¶] . . . [¶] . . . verbally told me that they, number one, believe that they have a right to intervene at any time," and that "the tribe's official position is that the minor is eligible for membership for the purposes of the ICWA, and that they believe that it should apply . . . . [¶] They also declined to finally intervene and put forth any position . . . ." Nieman added that "whether or not [the Tribe] assert[ed] their right to intervene [was] not a prerequisite to the application of the Indian Child Welfare Act."

The court responded, "[i]t might be, but . . . . I have no evidence right now. All I have is the request by the petitioners to declare that the act doesn't apply, and the way I look at it, the court of appeals tells me I should have a hearing. We're having the hearing. I don't see your client here with any evidence that he's a member of the tribe, and I would certainly consider any evidence, but I have nothing."

Nieman stated there was an exhibit that indicated Kyle's bloodlines and that his membership with the tribe was pending. The Rs' attorney Jane Gorman stated that she was not offering the exhibit into evidence, and the court refused to admit it on Nieman's motion because the document was hearsay and there was no foundation for its admission. The court stated that the tribe's notice of intervention preserved their right to intervene if the child was a member of the tribe, "[b]ut they haven't intervened . . . if they had intervened, then we could have had the hearing and they haven't. Now they indicate according to you that they may intervene later and we'll cross that bridge when we come to it."

After further discussion, the court stated it had "no evidence at all that the requirements of ICWA should apply to this particular case. [¶] [I]t needs to be demonstrated by a preponderance of the evidence that it should apply and I had nothing. . . . I will take judicial notice of this intent to intervene, but even today in the phone call that Mr. Nieman just got, it doesn't indicate that they're going to intervene."

In its written order, the court found that proper notice of the hearing on the applicability of the ICWA to the case had been given to the tribe; that the father and the tribe had the burden of proof to establish by a preponderance of the evidence that the ICWA should apply; that no evidence was presented upon which the court could base such a finding; and that therefore the court found that Brian was not an "Indian Child" within the definition in 25 United States Code section 1903(4). The court gave the tribe leave to revisit the issue of the applicability of the ICWA if the tribe wished to present new information, and the court set the trial on the petition to terminate Kyle's parental rights for April 18, 2002. The court was correct. The ICWA "does not require a trial court to continue a case indefinitely while awaiting a response from a tribe." (*In re Suzanna L.* (2002) 104 Cal.App.4th 223, 231.)

On April 17, 2002, the tribe sent a facsimile transmission to the Rs' attorney giving notice of an April 14, 2002 tribal resolution to have the child turned over to the tribe and adoption proceedings transferred to the tribe's juvenile court. The Rs filed an opposition to the petition to transfer the case before the trial the next day, however, the original documents did not reach the court until April 22 and the issue was not addressed by the court at the April 18 trial. When the documents arrived after the hearing had taken place, they were rejected and returned to the tribe. At the conclusion of the trial, the court terminated Kyle's parental rights. This appeal ensued.[1]

ISSUE ON APPEAL

Appellant contends "[t]he decision not to honor the Indian Child Welfare Act is error calling for reversal of that order and the subsequent order terminating Kyle's parental rights."

[1] The appeal by the Oglala Sioux Tribe was dismissed on September 16, 2002, for failure to file a brief after notice given under rule 17(a), California Rules of Court.

DISCUSSION

Appellant complains that the trial court erroneously applied the "existing Indian family" doctrine of *Crystal R. v. Superior Court* (1997) 59 Cal.App.4th 703 to this case, "that is, in order for Brian to be deemed an Indian child, Kyle and the tribe were required to produce evidence establishing that Kyle and/or Brian had significant cultural, political, and social ties with the tribe." We disagree. The record does not support this assertion. It is clear the court's request for evidence was for evidence that Brian was an Indian child, not whether Kyle or Brian were part of an existing Indian family.

If the state court does not have a conclusive determination from the tribe of the Bureau of Indian Affairs regarding the child's eligibility for tribal membership, the trial court must make its own determination regarding the child's eligibility for purposes of the ICWA. (*Matter of Baby Boy Doe* (Idaho 1993) 849 P.2d 925, 931.) The ICWA does not apply in the absence of evidence that the child was an "Indian child." (*In Interest of A.G.-G.* (Colo.App. 1995) 899 P.2d 319, 321.) The ICWA defines an Indian child as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).) Determination of tribal membership is exclusively a tribal question and a tribe's determination that a child is an Indian child is conclusive. (*Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 71-72.) The only exception occurs when the Bureau of Indian Affairs has made a determination so long as the tribe has not made a contrary one. (Cal. Rules of Court, rule 1439(g).) In 1999, California adopted section 7810 of the Family Code and section 360.6 of the Welfare and Institutions Code, both of which state in pertinent part: "(c) A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe shall constitute a significant political affiliation with the tribe

and shall require the application of the federal Indian Child Welfare Act to the proceedings."

The "Constitution and By-Laws of the Oglala Sioux Tribe of the Pine Ridge Reservation of South Dakota" (Constitution) provide that members are "All persons whose names appear on the official census roll of the Oglala Sioux Tribe of the Pine Ridge Reservation as of April 1, 1935," and "All children born to any member of the tribe who is a resident of the reservation at the time of the birth . . . ." The Constitution required the tribal council to adopt bylaws for future membership. No subsequently-adopted bylaws appear in the record.

Appellant states that the Notice of Intervention (Notice) provides evidence of Brian's membership in the tribe because the Notice states that the tribe "*is* the Tribe of the minor child/ren named herein." (Italics added.) The court took judicial notice of the Notice but interpreted it as the tribe's preservation of its right to intervene if it determined that the child was a member of the tribe. The court stated it was "presuming that they're figuring out whether or not the Indian Child Welfare Act applies." The court refused to consider the Notice as evidence of Brian's membership because the statement was hearsay and there was no testimony establishing a foundation for it.

" 'Evidence' means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." (Evid. Code, § 140.) The statement in the Notice that the tribe "is" the tribe of the child was hearsay, that is, it was "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) For a hearsay statement to be admissible in evidence, it must come under an exception to the hearsay rule. (Evid. Code, § 1200, subd. (b).) The burden of producing evidence as to a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence. (Evid. Code, § 550, subd. (a); *In re Krystle D.* (1994) 30 Cal.App.4th 1778, 1806.)

The trial court was correct in finding there was no foundation for admission of the statement in the Notice. It could not be admitted as a business record (Evid. Code, § 1271) because there was no testimony the statement was made in the regular course of a business at or near the time of the act, condition, or event; that the sources of information and method and time or preparation were such as to indicate its trustworthiness; and that the custodian or other qualified witness testified to its identity and the mode of its preparation. (Evid. Code, § 1271, subds. (a)-(d).) It is possible that Kyle might have been able to lay a foundation for other exceptions, for example, of the reputation among family members of his and Brian's ancestry (Evid. Code, § 1313), but he was not present.

However, even assuming, *arguendo*, that Kyle had testified that he was Brian's father and that he was listed in the tribe's census roll and that his enrollment in the tribe was pending, there were still the requirements of 25 United States Code section 1903(4) to be met. While there was no dispute that Brian was an "unmarried person who is under age eighteen" (25 U.S.C. § 1903(4)), there was no evidence he was either "(a) a member of an Indian tribe or (b) [wa]s eligible for membership in an Indian tribe and [wa]s the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).)

In determining whether a child is an Indian child, the tribe's constitution and bylaws must be used. (*Nelson v. Hunter* (Or.App. 1995) 888 P.2d 124, 126.) In the instant case, the tribe's Constitution defined members of the tribe as those whose names appeared on the official census roll as of April 1, 1935, or who were "born to any member of the tribe who is a resident of the reservation at the time of the birth of said child[]." There is no evidence Kyle's and Brian's names were on the 1935 census roll, and when Brian was born, Kyle was not a resident of the reservation.

The court was correct that there was no evidence that Brian was an Indian child in the record. There was no error.

DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.